

FRANKLIN ESCALANTI  
v.  
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-49-A

Decided September 15, 1989

Appeal from a decision of the Acting Phoenix Area Director, Bureau of Indian Affairs declining to cancel gift deeds of Indian trust property.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Allotments: Alienation

Approval of conveyances of Indian trust or restricted land is committed to the discretion of the Bureau of Indian Affairs. In reviewing such approvals, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion.

APPEARANCES: Christine A. Yalda, Esq., Sacaton, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Franklin Escalanti challenges a September 20, 1988, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA) declining to cancel gift deeds of trust property executed by appellant and approved by the Acting Superintendent, Fort Yuma Agency, BIA. For the reasons discussed below, the Board affirms that decision.

Background

Appellant is an enrolled member of the Quechan Tribe. On April 10, 1980, he applied at the Fort Yuma Agency to convey his interests in five allotments <sup>1/</sup> to Felicitas F. Stevens, a member of the Cocopah Tribe. For each allotment, he executed a document entitled "Application for Gift Deed

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<sup>1/</sup> These were Yuma Allotments Nos. 267, 268, and 779, and Homestead Allotments Nos. 4020 and 4032.

of Indian Land." He also executed, for each allotment, a deed in which he retained a life estate for himself and conveyed the remainder trust estate to Ms. Stevens for a consideration of \$1, love and affection. On each application, appellant signed a statement certifying that he had been advised of the value of his interest and that it was still his desire to convey his interest to Ms. Stevens. The Acting Superintendent approved each application on April 10, 1980, certifying that "the effect of this application was explained to and fully understood by the applicants." The deeds themselves were approved by the Acting Superintendent on April 14, 1980. Each deed bears a notation "As per Mr. Franklin Escalanti's request, please cancel this gift deed to be effective on October 3, 1980." The notation is signed by a different Acting Superintendent and dated October 27, 1980.

By letter received at the Phoenix Area Office on October 1, 1987, appellant questioned the deeds, stating that his attorney had advised him that consideration of "love and affection" was inadequate. Appellant further stated that he had been a heavy drinker at the time of the conveyances and had not understood what he was doing. He asked the Area Director to inform him of what he could do to "straighten this matter out." The Area Director requested a report from the agency concerning the circumstances surrounding execution of the deeds. The Superintendent reported that the agency had no further documentation concerning the deeds beyond those submitted by appellant, that the realty officer who had handled the matter was deceased, and that he believed the then Acting Superintendent had tried to talk appellant out of executing the gift deeds.

By memorandum of January 20, 1988, the Area Director informed the Superintendent that further information was required and requested that the agency conduct interviews and obtain affidavits from certain persons with knowledge of the circumstances. The memorandum requested that answers to the following questions be sought:

1. Was [appellant] capable of understanding the language of the deeds and the significance of his signing them?
2. Why did he choose to convey his interest in the property?
3. Were [appellant] and Felicitas Stevens ever married and if so, during what dates?
4. Did they live together as man and wife? When? Where?
5. Can they provide any other information about the deeds and the people involved?

Pursuant to the Area Director's instructions, affidavits were obtained from appellant, Stevens, the Acting Superintendent at the time of the conveyances, and the clerk-typist in the agency realty office. The affiants were requested to respond to the questions posed in the Area Director's memorandum.

Appellant stated in his affidavit that he did not understand the significance of the deeds but thought they were like a will so he could change his mind at any time before he died. He stated that he was drinking heavily during the period in which he made the conveyances and that he had conveyed the property to Stevens because she complained that she had always been poor. He further stated that he and Stevens had never been married and had never lived together as husband and wife.

Stevens' affidavit stated that she believed appellant "knew quite well the significance of what he was going [sic] because we had discussed it prior to the signing of the deeds and he assured me that this was what he wanted to do." With respect to appellant's reason for wanting to make the conveyances, she stated: "[Appellant] was the driver of a vehicle that was involved in an accident which resulted in the loosing [sic] my left leg below the knee. [Appellant] told me that because he had caused me to loose my leg that I need the property to take care of myself when he could no longer care for me." She stated that they were never legally married but lived together as husband and wife according to tribal custom from July 1977 to October 1982. She further stated: "On the date that [appellant] signed the deeds over to me at the Ft. Yuma Agency, we were attended by [the Acting Superintendent]. At that time, [the Acting Superintendent] tried to talk [appellant] out of signing the deeds over to me, telling him that we weren't married and had no children and was not generally a good idea to do this but [appellant] insisted on doing so. [Appellant] was not drunk during the signing of the deeds."

The Acting Superintendent's affidavit stated that appellant had acknowledged that he understood what he was signing and was aware of the impact it would have on his land ownership interest and what Stevens would be receiving. With respect to appellant's reason for wanting to make the conveyances, he stated that appellant had said he wanted to leave something to Stevens because he had no immediate heirs. The Acting Superintendent stated that appellant and Stevens were not married but were living together in common law status at the time of the conveyances. He further noted that several months prior to the conveyance to Stevens, appellant had come to the agency wanting to convey all his ownership interest to his nephew. He was advised against it and did not follow through.

The clerk-typist's affidavit stated that she was present when appellant executed the deeds to Stevens and that appellant was not drunk at that time, although she had seen him at other times with "alcohol on his person." She stated that some time after the conveyances were made, appellant came to the office wanting to take back the deeds so he could convey the property to his cousin. She also stated that the realty officer, now deceased, who had prepared the deeds, "would never perform such an important task as a conveyance to someone who was obviously drunk. She would not conduct business with someone who appeared drunk, let alone anyone who was obviously drunk."

On August 19, 1988, appellant's attorney wrote to the Area Director inquiring about the status of the investigation. By letter dated September 20, 1988, the Area Director responded to the August 19 letter as well as appellant's original request. Concerning appellant's argument

that the deeds were defective for lack of consideration, the Area Director cited 25 CFR 152.25, which provides in relevant part:

(d) Gifts and conveyances for less than the appraised fair market value. With the approval of the Secretary, Indian owners may convey trust or restricted land for less than the appraised fair market value or for no consideration when the prospective grantee is the owner's spouse, brother, sister, lineal ancestor of Indian blood or lineal descendant, or when some other special relationship exists between the grantor and grantee or special circumstances exist that in the opinion of the Secretary warrant the approval of the conveyance.

The Area Director found that by approving the deeds, the Acting Superintendent had determined that a special relationship and special circumstances existed between appellant and Stevens.

The Area Director further found from the affidavits that appellant was not drunk at the time of the conveyances and that he understood the significance of what he was doing. His letter concluded: "Once the deeds were executed and approved, the transaction was final. Even though the Superintendent later requested some of the deeds be cancelled, no one could legally have done so. [Appellant] would have to prove his case in Court to have the deeds declared null and void."

By letter of October 21, 1988, appellant appealed to the Washington, D.C., office of BIA. His appeal was pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. <sup>2/</sup> It was transmitted to the Board on May 16, 1989, for consideration under the new procedures.

By notice of docketing dated May 18, 1989, the Board gave the parties an opportunity to make any further statement they wished to make. No further statements have been received.

#### Discussion and Conclusions

Appellant contends that his abuse of alcohol prevented him from understanding the effect of the deeds he executed. This contention is similar to allegations sometimes made in Indian probate cases with respect to the effect of alcohol abuse upon testamentary capacity. The Board has addressed this issue on several occasions. In Estate of Comer Fast Eagle, 16 IBIA 40, 43 (1988), it held:

Long-term abuse of alcohol, per se, does not deprive a testator of testamentary capacity. Rather, it is the testator's condition at the time he executed his will that is decisive. Therefore, unless a testator is shown to have been intoxicated at

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<sup>2/</sup> See 54 FR 6478 and 6483 (Feb. 10, 1989).

the time he made his will or to have suffered permanent alcohol-induced brain damage, the fact that he drank excessively is not evidence that he lacked testamentary capacity. See Estate of William Bigheart, Jr., IA-T-21 (Aug. 9, 1969); Estate of John J. Akers, IA-D-18 (Feb. 26, 1968), aff'd, Akers v. Morton, 333 F. Supp. 184 (D. Mont. 1971), aff'd 499 F.2d 44 (9th Cir. 1974).

Appellant does not allege that he was intoxicated when he executed the deeds. Both Stevens and the clerk-typist state that he was not drunk. The Area Director found there was no evidence appellant had been drinking prior to his execution of the deeds. 3/

Appellant also contends that he did not understand the significance of his execution of the deeds, but thought he could later change his mind, as if he had signed a will rather than a deed. This contention is contradicted by his and the Acting Superintendent's signed statements on the five applications for gift deeds, as well as the affidavits of Stevens and the Acting Superintendent.

Appellant further contends that there was no special relationship between himself and Stevens that would justify approval of a gift deed to Stevens under 25 CFR 152.25(d). The evidence indicates that the two were living together at the time of the conveyances.

In White v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 142, 146 (1987), the Board considered an allegation of fraudulent procurement concerning a conveyance of Indian land. The Board held:

Approval of conveyances of Indian trust or restricted land is committed to the discretion of BIA. In reviewing such approvals, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration has been given to all legal prerequisites to the exercise of discretion. Wishkeno [v. Deputy Assistant Secretary--Indian Affairs (Operations)], 11 IBIA 21, 89 I.D. 655 (1982)]. Here, appellee considered and rejected the claim that the conveyance was fraudulently procured. That judgment is not clearly against the weight of the evidence.

In this case the Area Director considered the questions whether appellant was intoxicated when he executed the deeds, whether he understood the significance of what he was doing and whether a special relationship existed between appellant and Stevens. His conclusions are supported by the evidence.

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3/ In an affidavit submitted with his appeal of the Area Director's decision, appellant states for the first time that he had been drinking before he went to the agency to execute the deeds. Again, however, he does not allege that he was intoxicated.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 20, 1988, decision of the Acting Phoenix Area Director is affirmed.

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Anita Vogt  
Administrative Judge

I concur:

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Kathryn A. Lynn  
Chief Administrative Judge